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Chairman: Mr. Enkhsaikhan ..... (Mongolia)
later: Ms. Flores Liera (Vice-Chairperson) ..... (Mexico)
later: Mr. Enkhsaikhan ..... (Mongolia)

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The meeting was called to order at 3.10 p.m.

Agenda item 150: Report of the International Law Commission on the work of its fiftieth session (*continued*) (A/53/10 and Corr.1)

1. **Mr. Soares** (Chairman of the International Law Commission), introducing chapter VII of the report of the Commission (A/53/10 and Corr.1), on State responsibility, said that the first report of the new Special Rapporteur, Mr. James Crawford, had dealt with general issues relating to the draft articles, the distinction between "crimes" and "delictual responsibility" (draft article 19) and articles 1 to 15 of part one of the draft. The Commission had established a working group to assist the Special Rapporteur during the second reading of the draft articles. It had referred draft articles 1 to 15 to the Drafting Committee and had taken note of the Drafting Committee's report on articles 1, 3, 4, 5, 7, 8, 8 *bis*, 9, 10, 15, 15 *bis* and A and of the deletion of articles 2, 6 and 11 to 14. However, the draft articles remained in provisional form.

2. In addition to its discussion of the issues covered in paragraphs 219 to 240 of the report, the Commission had held its first substantive debate on the distinction between "criminal" and "delictual" responsibility since the adoption of draft article 19 in 1976. In that context, it had considered the concept of "objective" responsibility, the question of whether State responsibility was of a civil or a criminal nature, the appropriateness of an analogy to domestic law, the relationship between the international criminal responsibility of States and related concepts such as individual criminal responsibility, obligations *erga omnes* and norms of *jus cogens*, international law with respect to the criminal responsibility of States and the relevance of Chapter VII of the Charter of the United Nations and other special regimes.

3. The Committee had also considered five possible approaches to the question of international crimes of States: retaining the approach embodied in the draft articles in their current form; replacing the concept of "State crimes" by that of "exceptionally serious wrongful acts"; elaborating a full-scale regime of State criminal responsibility; rejecting the concept of State criminal responsibility; and excluding the concept of State crimes from the draft, without prejudice to its general scope and to the possibility of further elaborating the idea of "State crimes" in another text.

4. The Commission had failed to agree on the treatment of "crimes" and "delicts" and, in the absence of consensus on the future of draft article 19, decided to defer its discussion of that matter, examine other aspects of part one and consider whether the issues raised in article 19 could be resolved through a systematic development of obligations (*erga omnes*), peremptory norms (*jus cogens*) and the most serious breaches of international obligations.

5. The Commission had concluded that those matters should be considered in the Working Group and covered in the Special Rapporteur's second report. If no consensus was achieved through that process, it would return to the questions raised in the first report. It had then considered chapter I, articles 1 to 4 and chapter II, articles 5 to 15, of part one of the draft (paras. 332–358 and 359–451 of the report, respectively).

6. Lastly, the Commission had asked Governments to comment, with respect to part one of the draft, on whether all conduct of an organ of a State was attributable to that State under article 5, irrespective of the *jure gestionis* or *jure imperii* nature of the conduct; and, with respect to part two of the draft, on the appropriate balance between the elaboration of general principles and of more detailed provisions (paras. 35–36 of the report).

7. Introducing chapter X of the report (Other decisions and conclusions of the Commission), he said that the Commission had divided its 1998 session into two parts, meeting in Geneva to discuss the reports of the Special Rapporteurs and in New York to adopt draft articles. In commemoration of its fiftieth anniversary, it had held a two-day seminar in Geneva, the proceedings of which would be published. It had also issued the proceedings of the Colloquium on the Progressive Development and Codification of International Law, which had been held on 28 and 29 October 1997, and an *Analytical Guide to the Work of the International Law Commission, 1949–1997*. In addition, it had established an Internet Web site.

8. With respect to its working methods, the Commission had stressed the desirability of making the Special Rapporteur's reports available in advance of the session. To that end, it had requested that the Special Rapporteurs should submit their reports on time and that the Secretariat should distribute them to members in the language submitted upon receipt, and again after editing.

9. The Planning Group had re-established the Working Group on the long-term programme of work to consider topics which might be taken up by the Commission beyond the current quinquennium. The Working Group had identified various topics for inclusion in the Commission's long-term programme of work: responsibility of international organizations, the effect of armed conflict on treaties, shared natural resources (confined groundwater and single

geological structures of oil and gas) and expulsion of aliens. It would complete its work at the next session of the Commission.

10. The Commission had continued to cooperate with other international legal bodies and had invited the President of the International Court of Justice to discuss cases currently before the Court. The Commission had prepared the draft statute for an international criminal court and had been represented at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.

11. From 11 to 29 May 1998, the thirty-fourth session of the International Law Seminar had been held in Geneva with 23 participants, most of them from developing countries. Voluntary contributions to the United Nations Trust Fund for the International Law Seminar by the Governments of Denmark, Finland, Germany, Hungary, Ireland, Switzerland and Venezuela had made it possible to award fellowships to deserving candidates from developing countries; as all available funds had been exhausted, the Commission had recommended that the General Assembly should appeal to States to make voluntary contributions to the Fund so that the Seminar could be held again in 1999.

12. The Commission currently had six topics on its agenda; State responsibility, reservations to treaties, nationality and liability were in an advanced stage and required thorough consideration of complex issues, while diplomatic protection and unilateral acts of States raised questions not only of policy and substance but also of methodology. The Commission had therefore agreed that a 12-week session in 1999 was essential if it was to complete its work.

13. In closing, he said that on 14 August 1998 the Commission had adopted a resolution in which it expressed its gratitude to Mr. Roy S. Lee, Secretary of the Commission, for the friendly and efficient manner in which he had guided and assisted it and extended its very best wishes to him, on the occasion of his retirement.

14. *Ms. Flores Liera (Mexico), Vice-Chairman, took the Chair.*

15. **Mr. Szénási** (Hungary), speaking on the topic of international liability for injurious consequences arising out of acts not prohibited by international law, said that he wished to comment on the draft articles on the subtopic of prevention of transboundary damage from hazardous activities (A/53/10, chap. IV). His delegation fully supported the Commission's view that prevention should be the core function of States in combating transboundary damage. However, there was an inherent interrelationship between the duty to exercise due diligence and the question of State responsibility when obligations were not fulfilled. The provision of answers to fundamental questions such as the ones mentioned in paragraph 32 of the report would facilitate a common understanding of the obligation of States. The Commission should not lose sight of its original task of drafting rules on liability.

16. His delegation supported the following principles underpinning the draft articles: States were not precluded from carrying out activities not prohibited by international law, but that freedom had to be counterbalanced by the obligation to minimize the risk of significant transboundary harm; the obligation of prevention required States to exercise due diligence in cooperation with other States; and adequate dispute-resolution mechanisms must be provided, so that countries would be able to resolve disputes before harm was done.

17. Those principles had received wide support in the Sixth Committee, but the Commission was now facing the most difficult part of its task, which was to produce wording to make their application possible. The following elements should be taken into account. Firstly, the scope of application must be clearly defined. His delegation accepted the residual character of the draft articles and the Commission's intention for them to have global application with respect to hazardous activities posing risk of transboundary harm. Secondly, a balance must be struck between the economic interests of States and the interests of States likely to be affected. The draft articles provided the underpinnings of such a system but, as other delegations had pointed out, the specific interests of developing States might need further recognition. While the principles of the Rio Declaration must be acknowledged, the "over-nationalization" of standards would hamper uniform application and possibly defeat the goal of the exercise. Thirdly, the procedural rules on cooperation of interested States were essential. When codifying new trends in international law, such as "Information to the public" (art. 9) and "Notification and information" (art. 10), the Commission should seek greater clarity in order to make the rules more readily applicable. His delegation agreed with other delegations on the need for consideration of more stringent procedural rules and deadlines.

18. Turning to the topic of diplomatic protection (chap. V of the report), he said that Hungary agreed with the Special Rapporteur that the diplomatic protection of the citizen and the new status of the individual as a direct beneficiary of international law did have some overlaps. However, the two institutions could be separated, and the formula introduced by the *Mavrommatis* case should be reaffirmed, for that

would clear away some of the ambiguities. His delegation supported the establishment of a working group in that connection and the Commission's proposals on its future work on the topic.

19. Turning to the topic of State responsibility (chap. VII), he said that Hungary was still hopeful that the goal of adopting rules on the subject could be achieved, although some drafting difficulties persisted. The Commission appeared to be at a new stage in its work on the topic: many Governments had submitted comments on the draft articles adopted on first reading, and the new Special Rapporteur had called for a fresh approach. The result had been some radical changes in the content of the draft articles, which deserved commendation.

20. Hungary supported the Special Rapporteur's proposal that the question of the form of the draft articles should be deferred. Views were still deeply divided on the distinction between "criminal" and "delictual" responsibility, but almost everyone agreed that State responsibility should be viewed as a unified field and that, therefore, the concept of "State crimes" in the penal sense was as yet hardly recognized: in other words, State responsibility was neither criminal nor delictual but international. Although Hungary sympathized with the Special Rapporteur's efforts to "decriminalize" State responsibility, the Commission had been wise to defer a decision on "International crimes and international delicts" (art. 19). The systematic development of key notions, such as obligations *erga omnes* and peremptory norms (*jus cogens*), and a possible category of the most serious breaches of international obligations would resolve the contradiction created by article 19. That position should be seen as an answer to the question put by the Commission in paragraph 37 (b) of its report. As to whether all conduct of an organ of a State was attributable to that State under article 5, irrespective of the *jure gestionis* or *jure imperii* nature of the conduct, the short answer was yes.

21. His delegation welcomed the shortening of the text of part one of the draft articles, agreeing with Mr. Simma that considerable dead weight had been removed. It thought that article 40 should be regarded as one of the fundamental provisions. As currently drafted it did not offer a satisfactory response to breaches of obligations *erga omnes*, owing to its inconsistency with article 60 of the 1969 Vienna Convention on the Law of Treaties, which provided more restrictive rules. A narrower limitation of the competence of States with regard to invoking *erga omnes* violations would not negatively affect a response by the international community to grave violations of international law: existing procedures, such as Chapter VII of the Charter and the principal humanitarian and human rights instruments, could be used.

22. With regard to the topic of nationality in relation to the succession of States (chap. VII of the report), his delegation noted the preliminary conclusions of the Working Group on the nationality of legal persons and shared its view that the issues involved in the topic were too specific and the practical need for their solution was not evident. It would be better for the Commission and its Special Rapporteur to concentrate on the second reading of the provisionally adopted draft articles on the nationality of natural persons.

23. With regard to the draft guidelines on reservations to treaties (chap. IX.C), his delegation subscribed to the prevailing view that there was no need to alter the reservations regime contained in the three Vienna Conventions, although there was a need to fill some gaps and remove some ambiguities. It generally welcomed the draft guidelines adopted on first reading, but the Commission should not allow itself to be trapped in a lengthy "definitional exercise". In his capacity as the outgoing Chairman of the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe, he wished to pay tribute to a number of delegations, especially those of the Nordic countries and Austria, for their contributions to that Committee's work. At its latest session, the Ad Hoc Committee had decided to create a "reservations to treaties observatory". Special attention would be given to questions relating to reservations to treaties, in particular from the human rights perspective, with a view to contributing to the Commission's work, and to ways of assisting States members of the Council of Europe to develop their practice with respect to reservations and interpretative declarations.

24. **Mr. Jayaratnam** (Singapore), speaking on the topic of State responsibility, said that the identification of an injured State pursuant to article 40 was vital in determining the right to claim remedies against the wrongdoing State, including legitimate countermeasures. A State would first have to show that the right alleged to be violated was a primary rule in international law, and that the parties were bound by that primary rule. Where a multinational treaty was concerned, States were obviously aware of the provisions they had committed themselves to when they had ratified or acceded to the treaty. Where customary international law was concerned, States might be bound by a rule, whether or not they specifically consented to it, either on the basis of acquiescence or because it was a norm which created obligations owed to the international community. Two conditions thus existed before a State could rely on customary international law: that State must establish the

requirement of acceptance as a norm of customary international law, and must show a relationship between the violator and the State claiming the status of an injured State that was sufficient to grant standing under article 40. A corollary issue was the difficulty of determining what mechanisms might be applied when particular provisions were violated, since the choice of enforcement or dispute settlement procedures differed between treaty and customary international law. Under article 40, paragraph 2 (e), a State was an injured State where either a multilateral treaty or a rule of customary international law had been violated; it was not clear what happened when an overlap occurred. The general principle seemed to be that, where a multilateral or regional convention had mechanisms for reacting against violations, those mechanisms took priority. The Commission should clarify those issues and should consider the desirability of drafting separate provisions dealing with the two sources of international law rather than combining them.

25. His delegation agreed that the right of States to take countermeasures in response to unlawful acts was permissible under customary international law, but questioned the desirability of providing a legal regime for countermeasures because of the complexity of the issues involved. For example, articles 48 and 50 did not address the key issue of whether the measures taken should be related to the rights infringed; in general, article 50 did not reflect State practice or customary international law. Moreover, the application and impact of economic sanctions as countermeasures was inevitably dependent on the economic and political status of the injured and wrongdoing States; a more powerful State could impose more effective countermeasures than weaker States, especially developing and less developed States, and the impact would generally be far more detrimental to weaker States. The use of countermeasures would thus favour more powerful States and would potentially undermine any system based on equality and justice. The application of countermeasures should not adversely affect the rights of third States: the draft articles might need to address concerns on abuses against and contingencies for innocent third States.

26. His delegation was not convinced that the draft articles should take the form of an international convention, since that might create unnecessarily rigid rules.

27. Turning to the topic of reservations to treaties, he said that the draft guidelines on the definition of reservations and interpretive declarations did not prejudge the question of the permissibility or impermissibility of the reservations. His delegation believed that the regime of the Vienna Conventions had served the international community well and should be maintained; in particular, no distinction should be drawn between human rights treaties and other multilateral treaties. The report of the Special Rapporteur should take into account the fact that State practice in relation to the formulation of reservations to multilateral treaties, including human rights treaties, varied widely. There was little State practice to support the doctrine of severability. The Guide to Practice should also reflect current State practice in that area. He drew attention to the views expressed by States in that connection at the special meeting on reservations to treaties convened by the Asian-African Legal Consultative Committee on 14 April 1998.

28. With regard to the role of human rights treaty monitoring bodies, his delegation considered that it was for States parties to decide on the legality of the reservations formulated with respect to a given instrument, bearing in mind the object and purpose of the treaty. That was obvious from the provisions of articles 19 to 23 of the 1969 and 1986 Vienna Conventions. It was not appropriate for the monitoring bodies to make pronouncements on the nature or scope of a State party's obligations, or the validity of reservations, or to set aside reservations. However, States parties themselves could agree in the treaty itself that monitoring bodies should be given wider competence.

29. *Mr. Enkhsaikhan (Mongolia) resumed the Chair.*

30. **Ms. Efrat-Smilg** (Israel), speaking on the topic of State responsibility, said that her delegation felt that the new draft article 5 proposed by the Special Rapporteur represented an improvement; however, some of the ambiguities had not been resolved, but simply better hidden. One example was the apparent inconsistency between former articles 4 and 5, whereby internationally wrongful acts could not be affected by their characterization as lawful by internal law, on the one hand, but a State organ was a term defined with reference to internal law.

31. With regard to the specific question raised by the Commission in paragraph 35 of its report, she said that article 5 suggested that any conduct of a State organ in its capacity as such was attributable to the State; no distinction was drawn for the purpose of attribution between *acta jure imperii* and *acta jure gestionis*. According to draft article 10, the same principle applied even where such acts were committed by the organ *ultra vires*. Her delegation felt that that was the correct analysis and that the nature of the conduct, if exercised in the capacity of a State organ, should not present an impediment to the attribution of that conduct to the State. It felt that the issues of State responsibility and State immunity must not be confused, and that the distinction between *acta jure imperii* and *acta jure gestionis* operated on the plane of State immunity and not State responsibility.

Thus, while her delegation supported the restrictive approach concerning immunity for *acta jure gestionis*, it felt that that immunity did not imply that States were not responsible for such acts: on the contrary, the starting point for the question of State immunity in those cases was the liability, or at least potential liability, of States for all acts committed by themselves or their organs.

32. As to the second issue raised by the Commission, her delegation felt that part two, chapter II, of the draft as a whole needed improvement, both in form and in substance. Although the basic principle established in article 42 was one of full reparation, both article 42 itself and subsequent articles suggested a change in that principle. Article 42, paragraph 2, could be interpreted as a deviation from the full reparation standard, and opened the way for abuse by wrongdoing States. Her delegation also felt that the specific reference made to negligence and wilful acts or omissions suggested an emphasis on compensation and not on reparation as a whole, and ignored other equally significant factors. If compensation was to be the main remedy resorted to following an internationally wrongful act, article 44 was too brief, particularly when contrasted with the more detailed provisions in articles 45 and 46. The Commission should therefore amplify the guidance regarding compensation, either through codification of customary law, or by reference to the various forms of compensation proposed by the Special Rapporteur in 1989. In accordance with the principle of full reparation, the payment of interest should be the basic and general rule for compensation.

33. Her delegation had received the final version of the Commission's report only recently and hoped that, in future, it would be possible to gain immediate access to the report on the World Wide Web, rather than awaiting the hard copy version.

34. **Mr. Lehmann** (Denmark), speaking on behalf of the Nordic countries, said that they were satisfied with the progress made so far in the second reading of the draft articles on State responsibility. The issues involved were hardly new, and it was therefore surprising that doubts were being expressed about the value of the whole project; it seemed that States were reluctant to have any settlement, in particular a binding one, of responsibility for violating the rules that were established. Delegations must overcome such tendencies and work constructively to promote the rule of law and its implementation in international relations.

35. The Nordic countries believed that the draft articles reflected current practice but appreciated that some changes were needed, in particular in part one of the draft. They therefore supported the Special Rapporteur's efforts to amalgamate some provisions, or delete articles concerning situations which were not covered by the draft, relegating those explanations to the commentaries.

36. As to the specific questions raised by the Special Rapporteur in paragraphs 35 and 36 of the Commission's report, the Nordic countries felt that the distinction between acts *jure gestionis* and *jure imperii* should not be introduced into article 5. Such a distinction was extremely difficult to draw and could considerably restrict the possibility of a State being held responsible for committing an internationally wrongful act. They considered compensation to be, in practice at least, the most relevant element in making reparation for the injury caused, and favoured more detailed provisions on compensation, in particular with regard to the assessment of pecuniary damage, including interest and loss of profits.

37. On the question of the distinction between delicts and crimes, in article 19, the Nordic countries believed that a certain distinction was warranted depending on the seriousness of an internationally wrongful act, whatever terminology was used. A State which was in breach of the peace should incur particularly severe consequences as opposed, for example, to a State which had violated diplomatic privileges and immunities.

38. Speaking as the representative of Denmark, he said that his Government greatly appreciated the international law seminars held each year in Geneva in connection with the annual sessions of the Commission; it had made substantial contributions to the holding of the seminars over the years, and hoped that other Governments would do so too.

The meeting rose at 4.35 p.m.